BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAUL R. HUGHES	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,048,451
STATE OF KANSAS	)	
Respondent	)	
AND	)	
	)	
STATE SELF-INSURANCE FUND	)	
Insurance Fund	)	

ORDER

Respondent and its insurance fund appealed the June 27, 2011, Award entered by Administrative Law Judge (ALJ) Brad E. Avery. The Workers Compensation Board heard oral argument on September 21, 2011. The Director appointed Jeffrey King of Salina, Kansas, to serve as a Board Member Pro Tem in this matter in place of former Board Member Julie Sample.

APPEARANCES

Phillip B. Slape of Wichita, Kansas, appeared for claimant. Bryce D. Benedict of Topeka, Kansas, appeared for respondent and its insurance fund (respondent).

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award. At the regular hearing and at oral argument before the Board, the parties agreed that the preliminary hearing transcript of February 23, 2010, exclusive of the exhibits, should be made part of the record.[1] The parties also agreed to allow the Board to take judicial notice of the evidence and Award in Docket No. 1,047,646. The evidence includes the transcript of the June 14, 2010, regular hearing and exhibits thereto; the transcript of the June 23, 2010, deposition of Dr. Michael H. Munhall and exhibits thereto; the transcript of the September 2, 2010, motion hearing; the transcript of the September 15, 2010, motion

[1] R.H. Trans. (March 14, 2011) at 11. The March 14, 2011, regular hearing was held in Docket No. 1,048,451 and the June 14, 2010, regular hearing was held in Docket No. 1,047,646.

hearing; and the ALJ's September 16, 2010, Award. Additionally, the parties agreed that if the Board determined the ALJ erred by taking judicial notice of facts not in evidence, the Board would not remand the claim to the ALJ but instead the Board would conduct its de novo review based upon the agreed upon entire record. The parties stipulated claimant's average weekly wage was $531.60 and became $581.29 when fringe benefits were terminated on February 9, 2010.

ISSUES

In the June 27, 2011, Award, ALJ Avery determined claimant's award was limited to functional impairments for both upper extremities. Further, the ALJ found K.S.A. 44-510a is not applicable.

Respondent contends the ALJ lacked jurisdiction to hear this matter. It maintains "claimant is alleging an accident of August 31, 2009 – the same date that was adjudicated in docket no. 1,047,646."[2] Should the Board determine it has jurisdiction and that claimant's claim is not barred by res judicata, respondent denies claimant injured his upper extremities as a result of his employment and states that at best, claimant has left carpal tunnel syndrome for which claimant has not established any permanent impairment.

Claimant contends it is undisputed that he sustained injury to his bilateral upper extremities. Claimant argues his injuries were caused by overuse of his upper extremities at work from a series of accidents each and every working day while employed by respondent until his last day worked on August 31, 2009. Claimant submits he is entitled to a permanent partial disability based upon Dr. Lynn D. Ketchum's ratings of a 10% impairment to the left upper extremity and a 5% impairment to the right upper extremity. Claimant contends he was underpaid temporary total disability benefits and requests payment of the correct adjusted amount.

The issues before the Board on this appeal are:

1. Did the ALJ lack jurisdiction in the current claim because claimant's accident was fully adjudicated in Docket No. 1,047,646 and, therefore, is bared by the doctrine of res judicata?

2. What is claimant's date of accident?

3. If there is jurisdiction, did claimant meet with personal injury by accident arising out of and in the course of his employment?

4. If so, what is the nature and extent of claimant's disability?

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[2] Respondent's Brief at 1 (filed July 25, 2011).

5. Did the ALJ err by taking judicial notice of facts outside the record? If so, should that information be stricken from the record?

6. Was there an underpayment of temporary total disability benefits?

FINDINGS OF FACT

After reviewing the record and considering the parties' arguments, the Board finds:

Docket No. 1,047,646

At the regular hearing in Docket No. 1,048,451 respondent's counsel requested that the ALJ take judicial notice of the evidence and Award in Docket No. 1,047,646. He argued the court has no jurisdiction over the current claim because claimant's accident was fully adjudicated in Docket No. 1,047,646.[3] In his Award, the ALJ did not make a ruling on this issue.

The application for hearing in Docket No. 1,047,646, filed on September 29, 2009, indicates claimant's injury was to the "back and other affected body parts." The application for hearing states the source of the accident was "repetitive work duties, lifting machinery." The date of accident was listed as "Each and every working day through last day worked, including 8-26-09."[4] At the June 14, 2010, regular hearing the parties stipulated the date of accident is August 31, 2009. The stipulation did not specify whether claimant suffered a repetitive or traumatic injury to his back.

In Docket No. 1,047,646 claimant testified that in February 2009, due to Kansas Department of Corrections budget cuts, inmates from the nearby correctional facility discontinued providing labor at Cross Timbers State Park (formerly known as Toronto State Park). When the inmates assisted in maintaining the park, claimant supervised them. Beginning in February 2009, claimant was required to maintain the park himself. Maintaining the park required use of a backhoe, operating a chain saw, mowing and weed eating.

Claimant testified that on August 26, 2009, he needed to sharpen the blades on a riding lawn mower. He lifted the mower deck to stick a pin in to keep the deck up while he worked on the blades. When claimant lifted the mower deck, claimant felt he ripped something and had a lot of pain in the spine. Claimant told his supervisor the following day. Claimant's supervisor contacted the Pratt office and ultimately authorized Dr. McClintick to provide treatment.

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[3] R.H. Trans. (March 14, 2011) at 5-6.

[4] Application for Hearing, Docket No. 1,047,646 (filed Sept. 29, 2009).

On August 31, 2009, claimant saw Dr. McClintick. He treated claimant until September 18, 2009. Claimant has not worked for respondent or anywhere else since August 31, 2009. As of that date, claimant had been employed by respondent for approximately nine years.

Dr. McClintick referred claimant to Dr. Librodo, who saw claimant on September 25, 2009, and gave claimant temporary restrictions. Dr. Librodo provided claimant with non-surgical treatment until December 10, 2009.

Claimant had a history of back problems prior to August 26, 2009. In February 2009, claimant had back pain and made complaints of back pain as early as 2005. He testified that it was caused by using a backhoe and mower. He testified he would use the backhoe in winter and then begin mowing around April 15 of each year. The following discourse is significant:

> Q. (Mr. Slape) You've pled this case as each and every working day through August of 2009. Were there times that the pain would be worse because of duties you were doing or was there anything in particular that you were doing on the job that you felt made the problems worse in your back?
>
> A. (Claimant) Well, just any time you're on equipment is -- the bouncing of that seat, it seems like that's when it causes the most problems.
>
> Q. What seat are you referring to? What type of instrument?
>
> A. Backhoe and the mower. You know, the seats are not -- they don't have the shock absorbers in them so, you know, that's been a lot of the injury.[5]

Claimant testified that operating the mower caused problems to his back because of the uneven ride while mowing. He stated: "And it's just a -- it's a horror to mow and it beats you to death."[6] Claimant indicated weed eating did not bother his back unless he used a side-to-side motion.

At respondent's request, claimant saw Dr. David W. Hufford, who is board certified in family practice and as an independent medical examiner, with a certificate of added qualification in sports medicine. Dr. Hufford saw claimant on November 19, 2009. He indicated claimant had thoracic and lumbar pain. Dr. Hufford stated claimant's repetitive work duties and the August 26, 2009, incident aggravated claimant's preexisting back symptoms.

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[5] R.H. Trans. (June 14, 2010) at 32.

[6] *Id.*, at 34.

Claimant, at the request of his attorney, was seen by Dr. Michael H. Munhall, certified by the American Board of Physical Medicine and Rehabilitation and a Certified Independent Medical Examiner. Dr. Munhall saw claimant on March 31, 2010. Claimant told Dr. Munhall that lifting the mower deck caused severe pain throughout his spine. Dr. Munhall's report also states: " Today, Paul [claimant] describes chronic low back pain since 2005 aggravated daily during his employment with Kansas Department of Wildlife and Parks [respondent]."[7]

Respondent's counsel specifically asked Dr. Munhall about the causation of claimant's back injury. Dr. Munhall was asked to opine what effect the repetitive use of the mower, backhoe and weed eater had on claimant's back versus the specific injury of August 26, 2009. Dr. Munhall testified: "You can't separate out the time period from 2009 *[sic]*[8] up through the specific injury of 8/31/09 *[sic]*[9]. No one can."[10]

In accordance with the AMA *Guides*,[11] Dr. Munhall placed claimant in DRE Category II and assigned a 5% permanent impairment to the body as a whole as a result of the lumbar injury and 5% as a result of the thoracic injury. Combining the two impairments, Dr. Munhall determined claimant had a 10% permanent impairment to the body as a whole. Dr. Munhall's report stated that claimant had left-hand numbness. EMG studies by Dr. Rizwan Hassan showed claimant had moderate left carpal tunnel syndrome and mild right carpal tunnel syndrome. Dr. Munhall was not asked to opine if claimant had a permanent impairment as a result of bilateral carpal tunnel syndrome, as claimant's treatment for carpal tunnel syndrome was not complete.

Dr. Munhall assigned claimant significant permanent restrictions as a result of claimant's back injury. He opined claimant requires sedentary level employment with alternating sitting, standing and walking every two hours. Dr. Munhall opined that based upon the restrictions he assigned claimant, claimant could no longer perform 14 of 21 job tasks identified by Doug Lindahl, a vocational rehabilitation counselor, for a 66.6% task loss.

At the June 14, 2010, regular hearing, the parties agreed to stipulate to the original and amended reports of Doug Lindahl as part of the record. The job tasks identified by Mr. Lindahl are of particular importance to both claims. His report lists mowing park grounds

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[7] Munhall Depo., Ex. 2 at 2.

[8] Dr. Munhall stated 2009, but from the questions from respondent's counsel, it is apparent Dr. Munhall meant 2005.

[9] Apparently Dr. Munhall meant August 26, 2009, the date claimant reported injuring his back as a result of lifting the mower deck.

[10] Munhall Depo. at 18.

[11] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

and trails with a large deck mower or pull behind mower and using a tractor and brush hog to mow rougher areas of the park as two separate tasks. The physical requirements of both tasks are frequent reaching, handling, fingering, sitting, bouncing and twisting. Two other job tasks identified by Mr. Lindahl are using a weed eater to mow trails and around things and using chain saws, backhoe and dump truck to cut, pick up and move driftwood. Those tasks have the common physical requirements of frequent reaching, handling, standing and walking. The task of using the weed eater also requires twisting. The task of using the chain saw, etc., to cut and pick up driftwood also requires fingering, stooping with occasional sitting, and lifting and carrying up to 100 pounds.

At the June 14, 2010, regular hearing, respondent's counsel did not request the claims be consolidated. On June 30, 2010, respondent filed a motion to consolidate the two claims. An August 23, 2010, Order extended the terminal dates of both parties to September 3, 2010, to allow additional time for a hearing on respondent's motion to consolidate the claims. Claimant filed his submission brief on August 12, 2010.

Respondent's motion to consolidate both claims was heard on September 2, 2010. At that hearing, respondent asserted claimant's back and upper extremity injuries resulted from the same repetitive series of accidents. Respondent's counsel argued that if the claims were not consolidated, claimant's second claim would be res judicata and there would be no possibility of recovery on the bilateral upper extremity claim.

Claimant's attorney argued the claims had separate facts. In Docket No. 1,047,646, claimant suffered thoracic and lumbar back injuries as a result of repetitive injuries and a single traumatic incident on August 26, 2009. He pointed out that respondent considered claimant's back claim compensable. However, respondent denied the bilateral upper extremity claim. Claimant asserted that if the claims were consolidated, Dr. Munhall, who moved to Iowa, would have to reexamine claimant. It was also pointed out that claimant had already submitted his evidence to the ALJ and consolidating the claims would create a hardship for claimant.

On the same day as the motion hearing the ALJ issued an Order denying respondent's motion to consolidate. The ALJ stated:

> Motion to consolidate denied. Claimant is still treating for 2nd injury. Motion to consolidate was not filed until 6/29/10 *[sic]* and would require a separate regular hearing on Docket 1,048,451. The docket contains separate sets of defense *[sic]* raised by the respondent. There would be no efficiencies to the Court by granting the motion.[12]

No party appealed the ALJ's Order denying respondent's motion to consolidate.

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[12] Order (Sept. 2, 2010).

The ALJ issued an Award on September 16, 2010, in Docket No. 1,047,646 and made the following findings:

> **I) Nature and extent of disability**.
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> **a) Functional impairment.** The Court adopts the assessment of Dr. Munhall, who was the only health care provider to give evidence, and finds the claimant has a 10 percent functional impairment [to] the body as a whole.
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> **b) Wage loss.** The claimant is not employed. Claimant's wage loss is 100 percent.
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> **c) Task loss/permanent partial disability.** Dr. Munhall found claimant was unable to perform 14/21 tasks. His task loss is 67 percent. Claimant's permanent partial disability is 83.50 percent.
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> **II) Future and unauthorized medical care.** Claimant is entitled to unauthorized medical care up to the statutory limit. Claimant is entitled to future medical care [upon] application and review.[13]

None of the parties appealed the ALJ's September 16, 2010, Award.

Docket No. 1,048,451

Claimant filed his application for hearing in Docket No. 1,048,451 on November 24, 2009. The application indicates the injuries claimed are "bilateral upper extremities." The source of the accident is "repetitive work duties" and the date of accident is "Each and every working day through last day worked."[14] Claimant's work history and duties with respondent are discussed above.

Claimant began having problems with his left hand in the middle of the summer of 2009. He operated the riding mower by moving the T handle joystick with his left hand. He would mow every day that conditions allowed him to mow. At the March 14, 2011, regular hearing and the February 23, 2010, preliminary hearing, claimant testified he would mow six hours a day on the days he mowed. At the preliminary hearing claimant testified he is left-hand dominant and used his left hand 90% of the time to operate the joystick. During the mowing season, if claimant was not mowing, he cut wood with a chain saw or operated a weed eater. The vibration of the chain saw and operating the weed eater for long periods bothered both hands. Claimant's hand problems continued to worsen through August 31, 2009, when he discontinued working for respondent.

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[13] ALJ Award (Sept. 16, 2010) at 2-3.

[14] Application for Hearing, Docket No. 1,048,451 (filed Nov. 24, 2009).

At the March 14, 2011, regular hearing, claimant testified that after carpal tunnel release surgery, his left hand was free of pain and numbness, but felt stiff all the time. Claimant indicated his right hand was free of pain, numbness and swelling, but it lacked grip strength. Claimant indicated he has received no medical treatment for his right hand.

On February 24, 2010, the ALJ issued an order appointing Dr. Lynn D. Ketchum, an orthopedic hand specialist, to evaluate claimant. The ALJ asked Dr. Ketchum to render an opinion regarding whether claimant's carpal tunnel symptoms were caused, aggravated or accelerated by his work duties with respondent through August 31, 2009. The order requested the doctor evaluate claimant's condition and make recommendations as to future medical treatment. The order also asked that restrictions, opinions concerning apportionment of preexisting impairment, together with an opinion on task loss be rendered, if appropriate.

On April 8, 2010, Dr. Ketchum saw claimant. Dr. Ketchum indicated he reviewed EMG studies conducted by Dr. Hassan. The EMG studies revealed claimant had mild right carpal tunnel syndrome and moderate left carpal tunnel syndrome. Dr. Ketchum agreed with that diagnosis. He opined the prevailing factor causing claimant's bilateral carpal tunnel syndrome was the work claimant performed for respondent. The doctor also opined claimant had flexor tenosynovitis of the third and fourth digits of the left hand, which was also a result of claimant's work for respondent.

On May 10, 2010, the ALJ issued another order, authorizing Dr. Ketchum to provide medical treatment for claimant's bilateral carpal tunnel syndrome. Initially, Dr. Ketchum treated claimant's left carpal tunnel syndrome conservatively. When claimant's condition did not significantly improve, Dr. Ketchum performed a left carpal tunnel release on June 21, 2010.

Dr. Ketchum released claimant to regular duties on September 20, 2010, with no restrictions. He gave claimant no permanent restrictions. Dr. Ketchum opined that pursuant to the AMA *Guides,* claimant had a 10% permanent impairment to the left upper extremity and 5% permanent impairment to the right upper extremity. The ratings were based on a diagnosis of mild right carpal tunnel syndrome and mild to moderate left carpal tunnel syndrome with stenosing tenosynovitis of the left third and fourth digits.[15]

At his deposition, Dr. Ketchum reiterated that claimant's bilateral carpal tunnel syndrome was a result of his repetitive work activities. He testified that claimant is left-hand dominant and used the left hand constantly to operate the mower T handle. Using the T handle required constant turning and doing ulnar deviating movements. Dr. Ketchum opined, within a reasonable degree of medical probability, that weed eating contributed to

[15] Ketchum Depo. at 16, Ex. 2.

claimant's carpal tunnel syndrome. Dr. Ketchum's explanation of the mechanism that caused claimant's carpal tunnel syndrome is enlightening:

> Q. (Mr. Benedict) And what is your understanding of the mechanism that caused the carpal tunnel?
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> A. (Dr. Ketchum) Well, it's two mechanisms. In the course of a day the average person flexes and extends their fingers 3- to 4,000 times. In a situation where someone is repetitively gripping such as a lawn mower handle or a weedeater *[sic]*, it would be much more frequent. The second mechanism would be vibration which is a well-known cause of carpal tunnel syndrome.
>
> Q. Okay.
>
> A. And what happens with repetitive gripping is that the flexor tendons are gliding back and forth next to each other and under the transverse carpal ligament which forms a roof of the carpal tunnel and those produce shear stresses that result in thickening of the flexor tenosynovium. This produces a mass in the carpal tunnel that exerts pressure on the median nerve producing numbness and tingling.[16]

At respondent's request, claimant saw Dr. David W. Hufford, an orthopedic specialist, on November 19, 2009. A letter sent to Dr. Hufford by Lisa Day, Rehabilitation Nurse Case Manager with Corvel, indicated claimant suffered a traumatic injury when he was working on a mower deck. Dr. Hufford opined claimant had left carpal tunnel syndrome, but it was not work related. However, this opinion was based on Dr. Hufford's belief claimant suffered a single traumatic injury.

Dr. Hufford opined that claimant does not have right carpal tunnel syndrome. He reasoned that when an EMG/NCT shows evidence of carpal tunnel syndrome, but the patient has no symptomatology of the syndrome, that patient does not have carpal tunnel syndrome.[17] Dr. Hufford indicated he does not automatically assign an impairment when a patient has a positive EMG/NCT.

As indicated above, respondent filed a motion to consolidate the two claims on June 30, 2010. A detailed discussion concerning that motion is set out above.

The ALJ issued his Award in Docket No. 1,048,451 on June 27, 2011. He found claimant's left and right carpal tunnel syndrome arose out of and in the course of his employment with respondent. He determined the date of accident pursuant to K.S.A. 44-508(d) was September 25, 2009, the date claimant was assigned work restrictions by Dr. Librodo.

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[16] *Id.*, at 25.

[17] Hufford Depo. at 10-11.

The ALJ found claimant, as a result of the upper extremity injuries, had a 5% permanent impairment to the right upper extremity and 10% permanent impairment to the left upper extremity. Because Dr. Ketchum assigned no permanent work restrictions as a result of the upper extremity injuries, the ALJ found respondent rebutted the presumption that claimant was permanently and totally disabled.

In the Award is a footnote that states: "Although claimant did not know the exact size of the Park, the KDWP website refers to it as 'This 1,075-acre preserve . . . . .'"[18] Respondent's counsel takes umbrage with the footnote. Respondent's counsel alleges that respondent was denied due process because the ALJ conducted independent research and went outside the record to seek facts favorable to the claimant.

PRINCIPLES OF LAW

K.S.A. 2009 Supp. 44-501(a) in part states: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2009 Supp. 44-508(d) states:

> (d) "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day

[18] ALJ Award (June 27, 2011) at 3.

> before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[19] Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.[20]

K.S.A. 44-510f(a) in part states:

> (a) Notwithstanding any provision of the workers compensation act to the contrary, the maximum compensation benefits payable by an employer shall not exceed the following:
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> . . . .
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> (3) subject to the provisions of subsection (a)(4), for permanent or temporary partial disability, including any prior temporary total, permanent total, temporary partial, or permanent partial disability payments paid or due, $100,000 for an injury or any aggravation thereof; and
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> (4) for permanent partial disability, where functional impairment only is awarded, $50,000 for an injury or aggravation thereof.

Jurisdiction is generally defined as authority to make inquiry and decision regarding a particular matter. The jurisdiction and authority of a court to enter upon inquiry and make a decision is not limited to deciding a case rightly but includes the power to decide it wrongly. The test of jurisdiction is not a correct decision but the right to enter upon inquiry and make a decision.[21]

In *Swathwood*,[22] the Board stated:

> In *Randall* [Footnote citing *Randall v. Pepsi-Cola Bottling Co., Inc.*, 212 Kan. 392, 396, 510 P.2d 1190 (1973)], the Kansas Supreme Court held that res judicata applies to foreclose "a finding of a past fact which existed at the time of the original

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[19] K.S.A. 2009 Supp. 44-501(a).

[20] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995).

[21] See *Taber v. Taber*, 213 Kan. 453, 516 P.2d 987 (1973); *Provance v. Shawnee Mission U.S.D. No. 512*, 235 Kan. 927, 683 P.2d 902 (1984).

[22] *Swathwood v. Medicalodge of Columbus,* No. 270,543, 2010 WL 1918564 (Kan. WCAB Apr. 29, 2010).

> hearing." Likewise, in *Scheidt* [*v. Teakwood Cabinet & Fixture, Inc.*, 42 Kan. App. 2d 259, 211 P.3d 175 (2009)], the Kansas Court of Appeals held that a workers compensation case is, in most respects, like a court judgment and subject to res judicata. Issues necessarily decided in determining the award may not be relitigated unless specifically provided for by statute. The very nature of an employee's disability is an issue that must be decided in every final award. [Citation omitted.]

ANALYSIS

Respondent contends the ALJ lacked jurisdiction to hear this matter. It maintains the carpal tunnel syndrome claimant alleged in the current claim arose out of the same work activities during the same time period as Docket No. 1,047,646. Respondent points to the fact that claimant alleged the same date of injury in both claims and that the work activities that caused both injuries are the same or similar. Therefore, respondent argues the current claim is barred by res judicata.

Claimant asks the Board to affirm the ALJ's June 27, 2011, Award. Claimant contends that he had two separate and distinct injuries, one to his back and another to his upper extremities. These injuries were caused by two separate series of accidents that coincidentally occurred during the same time period.

In Docket No. 1,047,646, claimant alleged in his application for hearing a back injury and other affected body parts. He then alleged the source of the accident as repetitive work duties. The repetitive work duties of claimant were the cause of his back injury and his bilateral upper extremity injuries. The Board finds it significant that claimant added "and other affected body parts" to the application for hearing in Docket No. 1,047,646. Claimant was making a claim for all injuries to all body parts that were a result of his repetitive work duties each and every working day through the last day he worked for respondent. Claimant asserts that his bilateral carpal tunnel syndrome was a result of his repetitive work duties.

The cause of accident claimant listed in both claims was claimant's repetitive work duties. The Board acknowledges that in Docket No.1,047,646, claimant also indicated lifting machinery was a cause of his injury. In Docket No. 1,047,646, Dr. Munhall indicated he could not separate out what segment of claimant's injured back was caused by claimant's repetitive work duties and what segment of claimant's injured back was caused by the incident where claimant lifted the mower deck.

Vocational rehabilitation counselor Doug Lindahl determined that mowing park grounds with a large deck mower and using a tractor and brush hog to mow rougher areas of the park are two separate tasks. The physical requirements of both tasks are frequent reaching, handling, fingering, sitting, bouncing and twisting. Two other job tasks identified by Mr. Lindahl are using a weed eater to mow trails and around things and using chain saws, backhoe and dump truck to cut, pick up and move driftwood. Those tasks have the

common physical requirements of frequent reaching, handling, standing and walking. All of these tasks are "repetitive work duties."

The repetitive work duties that claimant alleges caused his back injury and his bilateral carpal tunnel syndrome are nearly identical. In both claims, claimant testified that operating the mower for extended periods of time caused his back injury and bilateral carpal tunnel syndrome. Claimant alleged in Docket No. 1,047,646 that bouncing on the backhoe seat also caused his back injury. According to Mr. Lindahl, operating the backhoe required frequent reaching, handling and fingering, which can cause carpal tunnel syndrome. Claimant testified operating the weed eater bothered his arms and if he operated it using a side-to-side motion, it caused his back to hurt.

In Docket No. 1,047,646 the parties stipulated the date of accident was August 31, 2009, the last date claimant worked. In Docket No. 1,048,451, claimant alleges the date of accident is each and every working day through his last day worked. The back injury and carpal tunnel syndrome that claimant is alleging occurred during the same time period.

In Docket No.1,047,646, claimant received an award of $100,000, based upon a finding by the ALJ that claimant had a permanent partial disability of 83.5%. The award was limited to $100,000 by K.S.A. 44-510f(a)(3). In Docket No. 1,048,451, claimant sought and was awarded additional benefits for bilateral upper extremity injuries which were a result of the same or similar repetitive work activities during the same time period. Claimant should not be permitted to use ambagious means to circumvent respondent's maximum liability for disability as set out in K.S.A. 44-510f(a).

The Board concludes the claim in Docket No. 1,048,451 is barred by res judicata and, therefore, the ALJ lacked jurisdiction to hear the claim. Claimant chose only to pursue his back injury in Docket No. 1,047,646, although he alleged in his application for hearing a back injury and other affected body parts. Once claimant's award in Docket No. 1,047,646 became final, the ALJ lacked jurisdiction to hear another claim arising out of the same repetitive series of accidents. Claimant had an obligation to pursue compensation for all injuries in Docket No. 1,047,646, but failed to do so.

The Kansas appellate courts in *Scheidt* and *Randall*, and the Board in *Swathwood*, ruled workers compensation claims are subject to res judicata. In *Scheidt*, claimant suffered an injury to both arms. The claim was settled as a whole body, permanent partial disability. Scheidt lost his job and sought a review and modification due to the resulting wage loss. The employer argued that in the original settlement, Scheidt should have had an award based on a scheduled injury and, thus, did not qualify for a work disability. The Board held, and the Kansas Court of Appeals affirmed, that the doctrine of res judicata applies to the determination that Scheidt's impairment was to the body as a whole. Here, the Board concludes that claimant is bound by the Award in Docket No. 1,047,646 and that his claim in Docket No. 1,048,451 is barred by res judicata.

CONCLUSION

The ALJ lacked jurisdiction to hear this claim (Docket No. 1,048,451). The doctrine of res judicata applies to the determination by the ALJ in Docket No. 1,047,646 that claimant suffered only a back injury.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.[23] Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board reverses the June 27, 2011, Award entered by ALJ Avery and denies claimant any additional impairment or disability award.

IT IS SO ORDERED.

Dated this ____ day of November, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Phillip B. Slape, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Fund
Brad E. Avery, Administrative Law Judge

[23] K.S.A. 2010 Supp. 44-555c(k).